IN THE SUPREME COURT OF THE STATE OF FLORIDA

SP.CT. CASE NO. 82,692
3RD DISTRICT - NO. 92-2234

CARLOS E. ROJAS, ET AL.,

Petitioners,

vs.

RYDER TRUCK RENTAL, INC.
ET AL.,

Respondents.
_____/

ON THE CONFLICT CERTIFIED FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF ON THE MERITS ON BEHALF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE PETITIONERS CARLOS AND ANN ROJAS

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STATEMENT OF CERTIFIED CONFLICT

This case is here as a result of the Third District Court's Certification of Conflict between its decision and that on the Second and Fourth District Johnston v. Donnelly, 581 So.2d 909 (Fla. 2d DCA 1991) and Reinhardt v. Northside Motors, Inc., 479 So.2d 240 (Fla. 4th DCA 1985).

STATEMENT OF FACTS

The Petitioners, Carlos and Ana Rojas, are residents of Massachusetts who were injured in an automobile accident which occurred in Florida. The Respondents, Ryder are the defendants in the Petitioners' personal injury action filed in Dade County Circuit Court. In their complaint, the Petitioners sought damages for injuries arising directly out of the accident, and damages for the aggravation of previously existing medical conditions. During discovery, the Respondents sought the Petitioners' medical records from a Massachusetts hospital and a Massachusetts health care plan, both of which had treated the Petitioners before and after the accident. These institutions failed to respond to the Respondents' subpoenas requesting the records. Ryder did not utilize Rule 1.350, nor did it seek to depose the medical providers pursuant to Section 45 of the laws of Massachusetts. Instead, the Respondents moved the trial court to compel the Petitioners to sign written authorizations - directed at the two health care institutions - permitting release of the medical records directly to the Respondents. The trial court granted the motion, and ordered the Petitioners to execute authorizations for the release of their medical records.

Reasoning that the procedure invoked here (i.e. executing written authorizations, followed by an *in camera review*, if requested) is a far more desirable process than a request for production under Florida Rule of Civil Procedure 1.350, the Third District Court denied the petition for certiorari without prejudice

to the Petitioners to object to the disclosure of the entire contents of the records, and to have them submitted to the trial court for an *in camera* inspection.[1]

SUMMARY OF ARGUMENT

This Court should reverse the Third District Court of Appeals decision, and adopt the holding and rationale of the Second and Fourth Districts. Aside from being in conflict with another decision in its own district,[2] The Third District Court decision is reversible for a number of reasons: 1) It effectively violates the separation of powers doctrine by altering the application of section 455.241, 2) is contrary to this Court's sole right to create or change Civil Rules of Discovery, 3) improperly compels the plaintiff to sign a blank medical authorization form, thus giving the defendant an illegal right to ex parte interrogation of the treating (or other) physicians, 4) provides the plaintiff with an illusory right of review of his objections through an in camera inspection of the medical records, which in no way alters the defense's right to legislatively violative ex parte communication with treating (and other) physicians, thus 5) promoting more litigation (through defense objections to plaintiff's subsequent needs for later interrogatories or deposition directed to the attorney to determine the extent of additional information gained through the ex parte interrogation).

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[1] The decision is reported at 18 Fla. L. Weekly D2215.

[2] See Public Health Trust of Dade County v. Chente, 565 So.2d 893 (Fla. 3d DCA 1990).

ARGUMENT

I. IT IS CONTRARY TO LAW AND FAIRNESS TO FORCE A PLAINTIFF TO SIGN A BLANK MEDICAL AUTHORIZATION FORM

Rule 1.350 provides in relevant part as follows:

> (a) Request; Scope. Any party may request any other party (1) to produce and permit the party making the request, or someone acting in his behalf, to inspect and copy any designated documents, including writings..., that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody or control of the party to whom the request is directed; ...

The legislature has provided for confidentiality of patient medical records, except as specifically provided by statute, in 455.241, Fla. Stat. (1991). 455.241 provides in pertinent part:

> Except as otherwise provided in s. 440.13 (2)(c), [medical] records shall not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or his legal representative or other health care providers involved in the care or treatment of the patient, except upon written authorization of the patient.
>
> * * *
>
> Except in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.

Ryder sought to discover the Plaintiffs' medical records which in part were located in Massachusetts. Ryder did not use Florida Discovery Rule 1.350 or the relevant Massachusetts Rule 45. Rather, it sought to circumvent these established requirements by attempting by Motion to Compel to force the Plaintiff into

executing and delivering to the Defendant a blank medical authorization form. The trial court granted the motions.

The Third District rejected both Rule 1.350 and the confidentiality protection under Florida Statute 455.241, in favor of its newly created rule - the "far more desirable process" test (executing blank authorizations, and providing in camera review upon objection). This new test is contrary to law and fairness and has been rejected by the the Fourth and Second Districts.

The Third District Court decision is reversible for a number of reasons: 1) improperly compels the plaintiff to sign a blank medical authorization form, thus giving the defendant an illegal right to ex parte interrogation of the treating (or other) physicians, 2) provides the plaintiff with an illusory right of review of his objections through an in camera inspection of the medical records, which in no way alters the defense's right to legislatively violative ex parte communication with treating (and other) physicians, thus 3) promoting more litigation (through defense objections to plaintiff's subsequent needs for later interrogatories or deposition directed to the attorney to determine the extent of additional information gained through the ex parte interrogation), 4) effectively violates the separation of powers doctrine by altering the application of section 455.241, and 5) is contrary to this Court's exclusive right to create or change Civil Rules of Discovery.

Indeed, the decisions of the Fourth and Second Districts in Reinhardt v. Northside Motors, Inc., 479 So.2d 240 (Fla. 4th DCA

1985) and Johnston v. Donnelly, 581 So.2d 909 (Fla. 2d DCA 1991), coupled with the reasoning of the First District in Franklin v. Nationwide Mutual Fire Insurance Company, 566 So.2d 529 (Fla. 1st DCA 1990), strongly support rejection of the holding and rationale of the Third District case at bar.

In Reinhardt v. Northside Motors, Inc., 479 So.2d 240 (Fla. 4th DCA 1985), the defendant - without requesting production of the medical records pursuant to Rule 1.350, Florida Rules of Civil Procedure, or implementing the procedures provided for by the Uniform Foreign Depositions Law, Section 92.251, Florida Statutes (1983) and its counterpart, Section 2023, Code of Civil Procedure of California - mailed petitioner a medical authorization form for the California records and requested that she sign and return it.

When petitioner failed to return the medical authorization form, respondents moved to compel compliance with their request. The trial court granted respondents' motion and provided for an in camera inspection of the records. Respondents argued that since the hospital is beyond the territorial limits of a Florida court's subpoena powers, they required an order compelling the petitioner to execute a medical authorization for the California records. Id. at 240. Just as in the case at bar, respondents made no attempt to obtain the records through the existing means of discovery.

The court stated that the trial court's holding (similar to that in the Third District in Rojas) would be reversed because the respondents failed to follow (and the trial court improperly abandoned) Rule 1.350, nor did the court properly apply Section

455.241, which would have barred discovery of the records in question.[3] Id. See also petitioners' brief on the merits at 7.

Similarly, in Johnston v. Donnelly, 581 So.2d 909 (Fla. 2d DCA 1991), the Respondent attempted to obtain the medical records of the Johnstons from their Canadian physicians who treated them before the accident. Similar to the facts in Rojas, some of the physicians refused to honor the Florida court's subpoenas issued pursuant to Florida Rule of Civil Procedure 1.351. Respondent also attempted to obtain the records by sending forms to the Johnstons for their signature. When respondent's attempts proved unsuccessful, she filed a motion to compel the execution of the medical authorization forms. In her motion, respondent alleged the physicians had not complied with the subpoenas and respondent knew of no other means for obtaining the records. The trial court granted the motion and ordered the Johnstons to sign and return the medical authorization forms. Id. at 909-10.

The Court in Johnson, in finding for the plaintiffs, like Reinhardt also specifically rejected what was the same holding and rationale as that of the Third District in Rojas:

Absent any waiver, the person seeking disclosure must use

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[3] The Fourth District also noted that "[i]n the absence of a showing that the records could not be obtained by the use of discovery procedures already provided by the rules of Civil Procedure, the trial court's order of compelling a party to execute a blank authorization for release of medical records, constitutes a departure from the essential requirements of the law." See Reinhardt, 479 So. 2d at 241. Accord, Condon v. Community Psychiatric Centers, etc., et al., 583 So.2d 1123 (Fla. 4th Dist. 1991) (certiorari granted under similar facts where respondents failed to show that the medical records could not be otherwise obtained by the use of available discovery).

> a statutory method or follow the Florida Rules of Civil Procedure. Compelling the patient to sign a written authorization is not one of the statutory methods, nor is it one of the methods of discovery recognized in the civil rules.
>
> In simply ordering the execution of a blanket release of medical information, the trial court bypassed the procedural safeguards of the discovery rules.

Id. at 910.

The recent First District Court opinion in Franklin v. Nationwide Mutual Fire Insurance Company, 566 So.2d 529 (Fla. 1st DCA 1990) also supports rejection of the Third District Court's holding and rationale.

In Franklin, Alfonso Franklin and his wife filed a petition for a writ of certiorari to review the non-final order of the trial court directing Mr. Franklin to execute the medical authorization form to the defendant. Finding the order violates section 455.241, the Court granted certiorari and quashed the Order. Id. at 530.

The Court then persuasively articulated reasons why this Court should similarly reject the Third District's holding and rationale in Rojas (and adopt the Second and Fourth District Court opinions).

It found that that the statutory language in Section 455.241 does not provide for the automatic waiver of the statutory privilege merely by the filing of a lawsuit. Id. at 531. The Court also reasoned that the statutory language was abundantly clear on its face, providing for waiver of confidentiality of covered medical information in only three circumstances:

> 1) in a medical negligence action, when a health care provider is or reasonably expects to be named as a defendant,
>
> 2) by written authorization of the patient, or

3) when compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.

Id. at 532.

More importantly, after determining that the defendant did not fit within the exceptions, the Court properly concluded that:

> [Nor does any] provision in the statute or the Rules of Civil Procedure authorized the court to compel the petitioner to execute and deliver a medical authorization for ex-parte communications by an opposing party or attorney with the physicians and (such as was ordered in this case). Hence, the Order is in direct violation of these statutory provisions.

Id. at 532.

The court in Franklin specifically rejected similar "efficiency" arguments which were adopted in Rojas, concluding that "[a]lthough informal ex parte communication with petitioner's physician may be more expedient, that is no reason why the procedures provided for by the statute and the Florida Rules of Civil Procedure should not be followed." Id. at 534; See Reinhardt. The same result should follow in the case at bar.

The Third District in Rojas erred in its decision which abrogates section 455.241[4] and the rules of discovery as they are now written that the plaintiff should be compelled to execute blank medical authorization forms for the defendant to take and ex parte interrogate the treating physician. The decision was based

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[4] While the Third District Court may certify questions to the Supreme Court, and to state the reasons for its requested change, it does not have the right to change the law. See Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). Nor can courts amend or modify acts of the legislature in order to uphold a policy favored by the court. Holly v. Auld, 450 So. 2d 217 (Fla. 1984). See also State v. Wershow, 343 So. 2d 605 (Fla. 1977) (under our constitutional system, courts cannot legislate).

entirely on the faulty premise that in camera inspections are a "far more desirable process" than a request for production under Florida Rule of Civil Procedure 1.350 (i.e., that they would decrease litigation and promote disclosure).

As readily outlined in Reinhardt and Franklin, placing the burden of protecting this confidentiality on a trial court, through in camera inspection, will not result in more efficient litigation. To the contrary, notwithstanding the resulting effective violation of the separation of powers doctrine in changing section 455.241, and the improper abrogation of the Civil Rules of Discovery, the trial court docket will actually be more cluttered, as it will be placed in the position of having to continuously conduct in camera inspections of medical records to determine their discoverability, and to cope with - among other problems - subsequent motions for protective order when plaintiffs notice defense counsel for deposition or propound interrogatories or other discovery to learn to substance of the defense's ex parte interrogations of treating (and other) physicians. It is obvious that the choice of discovery by defendant's would be through a blank medical authorization form, thus allowing defendants to interrogate treating physicians and - absent in camera inspection, to obtain both privileged and non-priviledged records. It would also then require the Plaintiffs to always require an in camera inspection to avoid ex parte interrogation of treating and other physicians by the defendant, or alternatively, to send a request for interrogatories to defendant (defense counsel), or to request his deposition (to which an

objection or motion for protective order would surely be filed and then required to be litigated). The result, in addition to the above-mentioned contravention of Rule 1.350, Rule 45 (Massachusetts) and section 455.241, is the opposite of what the Third District desires.[5]

Petitioner has a statutory right under section 455.241 to maintain the confidentiality of medical information pertaining to him that is in the possession of medical care providers, and discovery of such information cannot be compelled through the expedience of ordering the petitioner's execution and delivery of a medical authorization to the respondent] or its counsel. See Franklin, 566 So.2d at 532.[6]

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[5] Additionally, to the extent the Third District relied on the respondent's citation to Coralluzzo v. Fass, 450 So. 2d (Fla. 1984) such reliance is misplaced. This case preceded the 1988 amendments to section 455.241; while the Supreme Court in Coralluzzo found no statutory provision codifying the patient-physician confidentiality privilege, it did not make any reference to section 455.241, and clearly was not confronted with that statute as it exists at this time.

[6] It is interesting whether the rationale of the Third District, if upheld, should also apply in other discovery situations, and whether the plaintiff should have the equal right to ex parte discovery. Indeed, following the logic of the Third District, that its decision both fosters fair disclosure and that in camera inspections are more efficient, if we are to compel plaintiffs to execute blank authorizations which give defendants ex parte rights to interrogate physicians, the same right should be fairly applied for plaintiff requests to defendants in these and other cases involving any discovery requests. Amicus is not certain this Court wishes to sound the "death knell" for Rule 1.350 and other related discovery rules, in favor of a process which actually increases litigation, drowns already overburdened judges with waves of voluminous in camera inspections of documents that might relate to a case, and providing unfettered temptation by parties who are armed with ex parte interrogation rights to abuse those who possess the documents.

This Court should adopt the holdings and rationale of the Second and Fourth District Courts in Johnson and Reinhardt, and the reasoning of the First District Court in Franklin providing the petitioner with the portection and confidentiality the legislature intended, the protection from ex parte interrogation of his own treating physician as the legislature intended, the right to require the defendant to follow the due process proper procedure as set out in the Florida Rules of Civil Procedure, and to avoid the necessarily increased amount of litigation that would be caused by adopting the Third District Court opinion in Rojas.

It is for all of these reasons that this Court should reverse, rejecting the Third District Court's decision in Rojas and adopting the reasoning of the decisions of the First, Second and Fourth District Courts of Appeal.

CONCLUSION

This Court should reverse the decision of the Third District Court of Appeal, and adopt the holding and rationale of the Second and Fourth District case. Requiring the release of a party's entire medical records, authorization of medical records and advocating in camera inspection of medical records as a means of protecting the confidentiality of these records, is both violative of the law and will not achieve the desired results expressed by the Third District's decision.

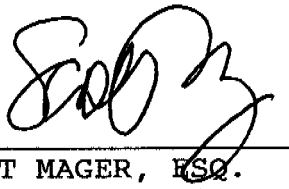
The Third District Court's decision improperly usurped the legislative function by effectively abrogating section 455.241, and is equally without power to change the civil rules determined by

this Court. Furthermore, the decision actually promotes more litigation, violates the Ex Parte Communication Rule, and promotes a dangerous precedent that may result in all discovery requests being forever modified to the fundamental due process detriment of the plaintiff.

This Court should side with the law and accomodate fairness in reversing the decision of the Third District, and adopting the decisions of the First, Fourth and Second Districts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true copy was mailed this 6th day of December, 1993, to ANDY TREUSCH, ESQUIRE, 11900 Biscayne Boulevard, #400, Miami, FL 33181, JEFFREY FOX, ESQUIRE, 11900 Biscayne Boulevard, #8808, North Miami, Florida 33181 and MICHAEL J. MURPHY, ESQUIRE, 420 S. Dixie Highway, Third Floor, Coral Gables, Florida 33146.



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